IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10720 OF 2004

M/s. Byculla Stores & Restuarant .... Petitioner

versus

Mr. Francis Rodriques & ors. ... Respondents.

Mr. R.A. Thorat i/b. M/s. Bharatwala 7 Co. for the petitioner.
J.P.Rodriques- Respondent no.8 present in person.

CORAM; P.V. KAKADE, J.

DATED; FEBRUARY 08, 2006.

P.C:

1. Heard the learned advocate for the Petitioner, as well as the contesting respondent no.8 in person.

Perused the record.

2. The petitioner has challenged the order dated 1-11-2004 passed by the lower court in Interim notice No. 3508 of 2004 in R.A.E. Suit No. 1022/3115 of 1986 which was discharged with no order as to costs. The notice was taken out by the present plaintiff/petitioner for amendment of the plaint on the ground mentioned therein.

3. The plaintiff has filed the suit interalia for eviction of the respondent no.8 from the suit premises on various grounds under the provisions of Bombay Rent Act. The suit was part-heard and witnesses's examination-in-chief was recorded in the matter. At that stage the plaintiff moved an application for amendment of the plaint in order to incorporate two grounds for ejection namely: (i) the change of user of the suit premises from commercial to residence and (ii) if the defendants have committed breach of terms and conditions of the tenancy resulted into a danger of termination of tenancy of the plaintiffs from their Head landlords; which may result into the plaintiffs loosing their tenancy right in the said premises.

4. The application was resisted by the respondents on various grounds interalia submitting that the plaintiff had amended the suit on earlier occasions and the amendment solely for the purposes of delaying the progress of the suit and the plaintiff had dragged the defendants since 1961. It was also submitted that the facts which are incorporated in the plaint by way of amendment were already to the knowledge of the plaintiff and therefore the amendment application was sought to be dismissed. The learned trial Judge after hearing both the parties, was of the view that the plaintiff had knowledge of the said grounds available

since prior to 1971 and the amendment was barred by limitation and therefore notice came to be discharged.

Hence the present petition.

5. At the outset it may be noted that it was the case of the plaintiff that they came to know about the change of user subsequently, and averred that in the open passage in front of the shop, which is for the access to shops, the defendant erected wooden platform and tried to enclose the entire passage in order to see that the shop and the passage becomes a single unit, which act on the part of the defendant is clearly in violation of terms of tenancy and it would create serious prejudice and jeopardise the plaintiffs' causeand the landlord of the suit has been recovering Rs. 50/- every month from the plaintiffs for the said open passage. Therefore because of the said act of the defendant, the plaintiff's tenancy right were said to be jeopardised and therefore amendment was sought for, which was found necessary.

6. In this regard it must be noted that no doubt that the amendment sought for is barred by limitation. However, the question before the lower court was whether the amendment sought for and grounds sought to be introduced in the plaint for eviction were necessary

for effective adjudication of the dispute between the parties. The learned counsel for the plaintiff sought to rely upon various rulings of this court and Apex court. In case of **Hari Shankar Singhania and others Vs. Dr. Gaur Hari Singhania and others, reported in 2002(4) Mh.L.J. page 938,** this court has taken a view thus:

> " Where the court feels that it is not possible to determine certainly and without evidence, on the face of the pleadings and material already on record, whether the proposed amendment is or is not barred by limitation, the court may not shut out an amendment. It could not be said with certainty before the evidence was adduced whether the pleadings which are sought to be added by means of amendment were barred by limitation on the dat eof the application for amendment".

This is especially so when the record is sufficient to show that the conversion of commercial use into residential use came to the knowledge of the plaintiff at the subsequent stage and therefore in the present case also it cannot be said that the amendment as sought for is infact time barred, and it cannot be

ascertained unless the entire evidence is allowed to be brought on record.

7. The Apex court in the case of **Ragu Thilak D. John Vs. Rayappan and others reported in AIR 2001 S.C. page 699** has taken a similar view that when the relief sought through amendment is barred by limitation and is disputed by plaintiff, the issue about limitation could be raised after allowing amendment. In the case of **Shrinivas Kesherlal Palod Vs. Vital Shivagir Gosavi reported in All India Rent Control Journal vol. VII-1996(2)** the Apex court is of the view that if the change of user of the premises is subsequently sought to be added after long delay, still such acquiescence does not save tenant from decree of eviction and for that purpose amendment has to be allowed. Similar is the view taken by the Apex court in the case of **Pankaja and another Vs. Yellaooa reported in 2004 AIR SCW 4522** wherein it was held that when the amendment of pleading sought after substantial delay still is to be allowed, though amendment sought after relief is barred by limitation can even be allowed in appropriate cases if that subserves cause of justice and avoids further litigation. In other words, it was held by the Apex court that the dominant purpose of allowing the amendment is to minimize the litigation between the concerned parties. If we take into account this ratio

laid down by the Apex court as well as this court, I do not have any doubt to hold that the view taken by the Apex Court appears to be applicable here that the amendment being discretionary, the same will have to be exercised for effective adjudication of the dispute between the parties leaving the issue regarding the bar of limitation open to be adjudicated at the time of final hearing of the matter between the parties.

8. In the result the Rule is made absolute. The order dated 1-11-2004 passed by the lower court in interim notice No.3508 of 2004 is hereby set aside and the petition is allowed in terms of prayer clause (b), with no order as to costs.

9. The trial court shall allow the amendment to be carried out within four weeks from the date of this order and then shall settle the additional issues if any, and proceed with the suit according to law.

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